In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-839

THE STATE OF OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered October 25, 1973. The petition for

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[1] "Pet." refers to the petition in No. 73-839. See note 2, *infra*.

a writ of certiorari in No. 73-822 was filed on November 24, 1973. On November 28, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 73-839 to and including December 1, 1973, and the petition was filed on November 28, 1973.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether wage controls promulgated under the Economic Stabilization Act of 1970 may constitutionally be applied to the employees of state governments.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, clauses 3 and 18 of the Constitution in pertinent part provide:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * * And To make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.

STATEMENT

On January 15, 1972, the Ohio General Assembly enacted a law ("Bill 147") providing for an average wage and salary increase of 10.6 percent for state em-

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[2] Section 211(g) of the Economic Stablization Act of 1970, as amended, 12 U.S.C. (Supp. II) 1904, prescribes a 30-day period for filing a petition for a writ of certiorari to review a judgment of the Temporary Emergency Court of Appeals; that provision, unlike 28 U.S.C. 2101(c), relating to the time within which petitions for writs of certiorari in other civil actions may be filed, does not authorize the Justices of this Court to grant extensions of time for filing. We therefore believe that the petition in No. 73-389, which was filed 34 days after entry of judgment by the Temporary Emergency Court of Appeals, was untimely.

ployees effective January 1, 1972. Following the enactment of Bill 147 and its approval by the Governor, an application for an exception was filed with the Pay Board for authority to implement the increase, which exceeded the 5.5 percent wage control guidelines (6 C.F.R. 201.10; 37 Fed. Reg. 24960) promulgated by the Pay Board pursuant to its authority under the Economic Stablization Act of 1970, Pub. L. 91-379, 84 Stat. 799. In an order dated March 10, 1972, the Pay Board approved a 7 percent wage and salary increase for the employees covered by Ohio's application.[3] Upon separate petitions for mandamus, the Ohio Court of Appeals and the Ohio Supreme Court both ordered Ohio officials to pay the full amount of the wage and salary increases provided by Bill 147, notwithstanding the Pay Board order. *State ex rel. Fry* v. *Ferguson,* 34 Ohio 2d 252; *State ex rel. Ervin* v. *Gilligan,* 35 Ohio App. 2d 84.

The United States then filed suit in the United States District Court for the Southern District of Ohio, seeking injunctive relief to prevent the payment of wages or salaries in excess of those permitted by the Pay Board order. The district court determined that there was

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[3] The Pay Board found, for the purpose of determining when a wage adjustment could be implemented under the applicable regulations, that the appropriate wage year for the employees involved was from November 14, 1971 through November 13, 1972. The Pay Board permitted the full increase which was requested by Ohio, 10.6 percent, to be implemented from March 17, 1972 to November 13, 1972. This action was taken when the Pay Board determined that payment at a rate of 10.6 percent from March 13 through November 13, 1972 was equal to payment at a rate of 7 percent from November 14, 1971 through November 13, 1972. The issue here, therefore, affects only wages and salaries for the period from January 1, 1972 through March 16, 1972.

a substantial question whether wage controls promulgated under the Economic Stabilization Act could constitutionally be applied to state employees, and the court certified this question to the Temporary Emergency Court of Appeals pursuant to Section 211 of that Act.

The court of appeals held (Pet. App. A, pp. 7-22) that the Act applied to state and local government employees and that the application of the Act was constitutional under *Maryland* v. *Wirtz*, 392 U.S. 183. Accordingly, the court permanently enjoined the State of Ohio and its officers from paying wage and salary increases in excess of those authorized by the Pay Board.

ARGUMENT

Petitioners principally contend that the application of the Economic Stabilization Act of 1970 to state employees interferes with state activities of a nonproprietary, governmental character and thus is contrary to the principles of federalism incorporated by the Tenth Amendment.[4] As the court below noted, in an opinion (Pet. App. A) on which we primarily rely, the issue raised by petitioners is quite similar to the one decided by this Court in *Maryland* v. *Wirtz*, 392 U.S. 183. In that case, Maryland challenged the application of the minimum wage provisions of the Fair Labor Standards Act to the employees of state-operated schools and hospitals, contending that the extension of that Act to

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[4] Petitioners' reliance on the Tenth Amendment adds nothing to their case. This Court has properly described the Tenth Amendment as merely "a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U.S. 100, 124. Thus it is not an independent limitation on the powers of the federal government. See *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405-406; *Oklahoma* v. *Atkinson*, 313 U.S. 508, 534.

state employees violated "state sovereignty in the performance of governmental functions." 392 U.S. at 195. The Court rejected that contention in terms equally applicable here (*id.* at 195-197):

> This argument simply is not tenable. There is no general
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> > "doctrine implied in the Federal Constitution that the 'two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.' " *Case* v. *Bowles,* 327 U.S. 92, 101.
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> * * * As long ago as *Sanitary District* v. *United States,* 266 U.S. 405, the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce. * * *
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> * * * [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved.

Petitioners contend that *Maryland* v. *Wirtz* is distinguishable as involving only "proprietary," and not "governmental," activities. But this Court has expressly denied the relevance of that distinction when Congress acts, as it did here, pursuant to its powers under the Commerce Clause. In *United States* v. *California,* 297 U.S. 175, 183-185, the Court stated:

> * * * [I]t [is] unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. * * *

> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Thus the Court in *Maryland* v. *Wirtz* concluded (392 U.S. at 195) that Congress, in exercising its commerce powers, "may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."

This does not, of course, mean that Congress, in the guise of regulating commerce, can constitutionally regulate the substantive performance of state functions by "draw[ing] up each State's budget." *Maryland* v. *Wirtz, supra,* 392 U.S. at 205 (dissenting opinion of Mr. Justice Douglas). It does mean, however, that general regulations of commerce, affecting governmental and nongovernmental employers alike, are within the power of Congress. The Economic Stabilization Act does not regulate the substantive performance of state functions; it merely provides, insofar as is here relevant, that the States, in their capacities as employers, are, like private employers, restricted in the extent to which they can grant wage and salary increases. The Act "does not otherwise affect the way in which * * * [the employees'] duties are performed." *Maryland* v. *Wirtz, supra,* 392 U.S. at 193.

Petitioners further contend that the application of the Act to the States lacks a rational basis. This contention is without merit. If the federal program of wage and price controls was to be at all effective in stabilizing the economy and limiting inflation, it was imperative that

all large employers, both public and private, be subject to federal regulation. See, *e.g.*, S. Rep. No. 92-507, 92d Cong., 1st Sess. 4; 117 Cong. Rec. 43,673-43,674, 43,677.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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